UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,	)	Case No. 18-cr-00258-EJD
Plaintiff,	)	San Jose, California
	)	Friday, October 12, 2018
vs.	)	
ELIZABETH A. HOLMES and RAMESH "SUNNY" BALWANI,	)	
Defendants.	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SUSAN VAN KEULEN
UNITED STATES MAGISTRATE JUDGE

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SAN JOSE, CALIFORNIA FRIDAY, OCTOBER 12, 2018 10:07 A.M.

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THE CLERK: Calling the matter of United States v. Elizabeth A. Holmes, Case Number 18-cr-00258.

THE COURT: All right. We're on today for Defendants' motion for a cease and desist order. So if I can get Counsels' appearances, please.

MR. BOSTIC: Good morning, Your Honor. John Bostic for the United States.

THE COURT: Mr. Bostic.

MR. LEACH: Good morning, Your Honor. Robert Leach for the United States.

THE COURT: Mr. Leach, good morning.

MR. SCHENK: And Jeff Schenk. Good morning again, Your Honor.

THE COURT: Mr. Schenk.

MR. DOWNEY: Good morning, Your Honor. Kevin Downey for Elizabeth Holmes and my colleague, Seema Roper Mittal, is with me.

THE COURT: Good morning.

MR. COOPERSMITH: Good morning, Your Honor. Jeff Coopersmith for Defendant Ramesh Balwani and with me are my colleagues Amanda McDowell and Kelly Gorton.

THE COURT: Good morning. Good morning. Thank you all for being here. I appreciate that. All right. It's Defendants' motion, so we'll start with them. I do have some background

questions, a few general questions, so let me ask those and I'll have Mr. Coopersmith respond and then, Mr. Bostic, if you want to -- you can concur in those. I don't think these are controversial, but if you have any comments to add, then you may.

MR. COOPERSMITH: Your Honor, would you prefer that I remain at the podium or would you like me --

THE COURT: Why don't you have a seat. I think that's a little easier. We don't have a lot of room.

MR. COOPERSMITH: Thank you, Your Honor. Oh, I should have said for the record that Mr. Balwani is present in the courtroom as well.

THE COURT: All right. Thank you.

MR. DOWNEY: As is Ms. Holmes, Your Honor.

THE COURT: All right. Thank you. Good morning.

MS. HOLMES: Good morning.

THE COURT: All right. A couple of questions first. So the documents at issue in this most recent production, they're just the documents from the September 14 production; is that right?

MR. COOPERSMITH: Yes, Your Honor. What occurred as I understand it -- and Mr. Bostic doesn't really disagree with it -- is that there was a subpoena in September 2017.

THE COURT: Right.

MR. COOPERSMITH: And some of those were produced, even before the indictment in June.

THE COURT: Right.

MR. COOPERSMITH: At this point, there were, I believe it's in the hundreds of thousands of documents and the pages may be even higher than that -- in the millions. And in -- more recently, when Theranos was on the verge and now is in this sort of --

THE COURT: Right.

MR. COOPERSMITH: -- receivership proceeding, the Government asked for these documents, these hundreds of thousands of pages. That's what's directly at issue in the case, as I understand it, Your Honor, and at this point --

THE COURT: Well, what's at issue right now is -- I mean, the object of your cease and desist order is -- is a specific production that was produced on September 14th --

MR. COOPERSMITH: Yes, Your Honor, and any -- and any further production that they might try to get under that subpoena.

THE COURT: I understand.

MR. COOPERSMITH: And one clarification. So the Government actually has those documents in their possession.

THE COURT: I understand.

MR. COOPERSMITH: We don't agree with that. But Mr. Bostic and his team have agreed not to review them --

THE COURT: Right.

MR. COOPERSMITH: -- pending the Court's ruling.

THE COURT: Right. I just wanted to be sure we were

talking about -- we're not here about anything that's already been produced. We're focused on these documents that were turned over on the 14th. And I appreciate that your order -- or your order -- my order, your motion -- would extend to any further production.

MR. COOPERSMITH: Yes, Your Honor. And for that matter, there might be, depending on how the Court rules, something in this that affects the Government's ability to use the grand jury process, you know, more generally.

But -- but you're right that today we're speaking about the specific production of these three hundred- -- we'll call it 300,000 documents. There may be something like that.

THE COURT: And do you know, Mr. Coopersmith -- and I appreciate that Mr. Bostic may be in a better position to respond to this -- but it was also -- what I gleaned from the papers was that this production from September 14 is a specific date range; that is, it picks up -- these documents are from October 2016 to October 2017.

MR. COOPERSMITH: I think it's October 2016 through September 2017.

THE COURT: Okay.

MR. COOPERSMITH: And as -- when I get into the substance, I think that's going to become an important fact. But --

THE COURT: I understand.

MR. COOPERSMITH: -- yeah, that's my understanding of

the time period.

THE COURT: That's why I asked the question.

MR. COOPERSMITH: Yes, Your Honor.

THE COURT: All right. And in this production, do you know how many pages or files or -- do you have some volume that you're using?

MR. COOPERSMITH: My understanding, it was like -- something like 300,000 but, again, I think Mr. Bostic's in a better position since -- he hasn't reviewed the documents, but he probably has an idea of the volume. I think it's something like 300,000 documents which might translate to a lot more page.

THE COURT: I understand. Okay. And I also understand that before these documents were turned over to the Government, that Theranos at the time -- there were some filters. There was some filtering of the documents, looks like maybe with attorney names and law firm names.

MR. COOPERSMITH: Yes. I'm told that that is the case, Your Honor. But they didn't exclude -- there were some lawyers that still there were documents relating to them.

THE COURT: I understand. I'm just trying to, again, get a sense of --

MR. COOPERSMITH: They did try to do, as I understand it, a filter to weed out like the kind of core, privileged documents between company counsel and the company, as I understand it.

THE COURT: And do you know how many documents were withheld --

MR. COOPERSMITH: I do not, Your Honor.

THE COURT: -- as a result of those filters?

MR. COOPERSMITH: I do not.

THE COURT: Okay. All right. And now this hearing was set with an eye towards the further proceedings before Judge Davila which I understand are set for Monday.

MR. COOPERSMITH: Yes, Your Honor.

THE COURT: Okay. And what's the agenda for the hearing before Judge Davila?

MR. COOPERSMITH: In this case, Your Honor, I understand that Judge Davila wanted a status conference. We haven't filed it yet, but Judge Davila's chambers asked the parties to compile a status report --

THE COURT: Okay.

MR. COOPERSMITH: -- which should be filed hopefully today. And basically he just wanted to know what was going on. I think what's going to be discussed at that hearing are -- is basically the status of discovery. I think that, you know, this motion, depending on what this Court does, will come up -- I'm quite sure.

And then there may be some discussions about scheduling the case, which there hasn't been a schedule set yet. So that's what I think the agenda is.

THE COURT: Okay. And that's -- that's what I needed to know, sort of how whatever we do here today then may impact what the discussion are on Monday.

MR. COOPERSMITH: Yes, Your Honor.

THE COURT: Okay. All right. That's very helpful. Okay. Before we move to the substance of the motion then, Mr. Bostic, do you have anything to add on the -- like questions around the production?

MR. BOSTIC: Not much, Your Honor. I'm happy to answer any additional questions the Court might have, but I think the information provided by Mr. Coopersmith was accurate.

Again, the Government has not reviewed the most recent production, --

THE COURT: I understand.

MR. BOSTIC: -- so I don't know exactly what it consists of. I think it does involve approximately 270,000 documents.

THE COURT: Okay.

MR. BOSTIC: I'm informed by Theranos counsel that they did conduct a privilege filter review and excluded -- I don't know how many -- but I would imagine many documents from that set. The privilege filter was reviewed by the Government before it was used. It was a negotiated privilege filter and it included I think upwards of a hundred entries for several law firms and numerous lawyers that the company and the individual Defendants have had dealings with.

THE COURT: So I had a question as to whether there were other filters, but it sounds like -- I think the filters were generally described in the papers as law firms and lawyers' names.

MR. BOSTIC: I believe that's right. There was some discussion of using terms like "confidential" and "privileged" in that filter as well. I -- I don't know whether those terms ended up being in the final filter that was used.

THE COURT: Okay.

MR. BOSTIC: But certainly it did include the vast majority of the lawyers that the company and the individual Defendants worked with, again with the exception of just one or two in-house lawyers, I believe, who had dual roles and who couldn't be excluded in that way.

THE COURT: Okay. And do you have any other information regarding the proceedings before Judge Davila on Monday?

MR. BOSTIC: No, Your Honor. I think Mr. Coopersmith's statement summed it up.

THE COURT: Okay.

MR. BOSTIC: The only thing I would add about the source of the documents in the recent production, besides the privilege filter, I should just point out that those documents were collected based on a different set of search terms that were subject-based. So, in other words, to make sure that it was capturing only relevant documents or to maximize relevant documents and minimize irrelevant documents, topic-based search

terms were used that were generated by the company.

THE COURT: And is it also your understanding that the date frame on this latest production runs from October 2016 through -- whether it's September or up to October 2017?

MR. BOSTIC: It would be through the date of the subpoena in September 2017. Yes, Your Honor.

THE COURT: Okay. Got it. All right. That's very helpful. Thank you.

All right. Mr. Coopersmith.

MR. COOPERSMITH: Thank you, Your Honor.

THE COURT: I have, obviously, reviewed the papers and all of the supporting declarations and documents, so I think I'm familiar with the issues and the concerns. But with that in mind --

MR. COOPERSMITH: Thank you, Your Honor, and I'll try not to repeat what we wrote in the papers. But I think what we've got here is essentially a legal issue, and this is what I think the core dispute before the Court is.

As I understand it from reading the Government's papers and having discussions with Government counsel, their theory is that so long as there's some possibility that something will come to light that could lead them to get a superseding indictment or, in this case, a second superseding indictment, that they can keep on going with the grand jury until they rule out that possibility.

And I think that that is not the law. Because, if it were

the law, there would be no limit to what the Government could do with the grand jury post-indictment. In other words, it's every case, Your Honor, and it's -- I can say -- 100 percent of the cases where it's always possible that you can find some other witness or some other document or something that you can't rule out, because you don't know what it is yet, that, Oh, maybe this would be something that we would supersede with. And that, again, can't be the law because there would be no limit in principle.

And I think that's the reason, when you look at these cases that have been cited in the briefs, why the courts came up with a test that's not just, Oh, we have to prove the Government's intent or we have to prove it's -- the sole purpose is to prepare for trial. The reality is the cases say it's the sole or dominant purpose.

In other words, if the Government has -- clearly, if they have a purpose only to prepare for trial and not to investigate, then that would be improper. But if that's the dominant purpose or the primary purpose, that would also do it.

And I think --

THE COURT: But that -- and that's the presumption; right? I mean, that's -- there's a presumption that it's -- that they're moving forward appropriately, and there's a limit to it -- as you say -- sole and dominant -- what is the sole and dominant purpose -- that's the question -- but demonstrating what that is to overcome the presumption, that's your burden; right?

MR. COOPERSMITH: Yeah. Your Honor, I don't know that I'd go so far as to call it a presumption. I think there's a bit of tension here between the branches of government; right? You have the government with investigatory power. You've got the court. But the court and the cases make clear it has clear supervisory power over the grand jury process. And what this really is -- and I think the cases bear this out -- it's a facts and circumstances test.

THE COURT: Uh-huh.

MR. COOPERSMITH: And I'm going to go into that. But the timing and the circumstances -- this is really how you determine what the dominant purpose is. And it's not a matter of inquiry into the mind or soul of, you know, John Bostic as to what he really thinks.

You know, so, for example, a declaration from the Government, which we have here, that just says, "We're still investigating," I mean, that's not really of much relevance because we're really talking about all the facts and circumstances that are here, and I want to talk about that.

But before I even do, I want to just briefly touch on the issue of standing. I don't think I have to spend long on that because -- and I don't say this lightly, Your Honor -- but I think it's essentially a frivolous argument.

Basically, the Government says we don't have standing because they issued the subpoena to Theranos and we're not Theranos and

we're the Defendants in the case.

But that can't be the law, first of all -- and I'll explain why the cases don't even support that. It can't be the law because the whole principle here is that the Government is not supposed to be able to use the grand jury process for trial preparation purposes. It can only use it for investigatory purposes with the intent or purpose to return an indictment -- in this case, a second superseding indictment.

And so there's no -- the standing issue -- if we didn't have standing, then who would have standing to object to an abuse of the grand jury process that is really for the purpose of trial preparation? If a defendant didn't have standing, no one would have standing. And you can imagine a situation -- let's just posit a clear case where you had an email from the Government that went to a third party witness that says, you know, Please find enclosed this grand jury subpoena and our purpose is to prepare you for trial. And let's say it's, you know, a month before trial. Under the Government's position, you wouldn't have standing even in that case -- and that can't be the law and, in fact, it's not.

And when you look at the cases we cited -- and I want to point out in particular the *Schmidt* case, which is --

THE COURT: Well, before we -- before we go to the cases, --

MR. COOPERSMITH: Yes, Your Honor.

THE COURT: -- what is -- what's your basis for standing? Because it's not -- it's not entirely clear from the briefs. Is it the Defense status; that is, the Defendants, obviously, are subject to indictments that arise, at least in part, out of these productions?

MR. COOPERSMITH: First and foremost, Your Honor, our standing rests on the fact that Mr. Balwani and Ms. Holmes are criminal defendants who have a right to have this case proceed under the Rules of Criminal Procedure and not through some extraordinary discovery process of the grand jury that's outside of that.

And the abuse of the grand jury and our rights as criminal defendants to the application of the correct rules and not having abuse of the grand jury is exactly what our standing rests on.

There is -- and maybe this is the Court's statement about some confusion -- there is another point, which I believe Ms. Roper will address, primarily -- that there are, we think, quite likely common interest privileged materials in this document set, and we'd also have standing base on that.

But when you go -- I think --

THE COURT: So it's both?

MR. COOPERSMITH: Yes, Your Honor, but primarily our status as criminal defendants.

THE COURT: Uh-huh.

MR. COOPERSMITH: And -- and I think the cases allow for

both grounds of standing. So, for example, in the *Schmidt* case from the Third Circuit, the Government has the exact same argument. It has to depend on the privilege interest or property interest, and the court said -- and this is quoting from page 1026 of the Third Circuit's opinion in *Schmidt*, the court says, "More fundamentally, we think the Government's suggestion that the courts limit standing to claims of abuse of the grand jury process through persons whose property interest or privileges have been invaded, is not a viable one."

And then, in addition, Your Honor, *Fernandez* from the First Circuit says the same thing -- they go into this at length and the court concludes -- they cite *Schmidt* and they say, Yeah, a criminal defendant who's challenging an abuse of the grand jury process because it's merely being used for trial preparation, has standing.

Now, the Government spends a lot of time in their brief on standing, but they cite no case that says we don't have standing. What they do instead is they try to distinguish the cases we cited. And there's no case they say -- and there's case after case where the courts don't even discuss standing -- they just proceed to the merits because it's so clear.

So that's the standing issue, Your Honor. I don't think anyone needs to spend much time on that because the cases are so clear that someone in Mr. Balwani's position and Ms. Holmes' position do have standing to object to use of the grand jury

process for trial prep.

Now, Your Honor, I want to just move to what I think's really going on here; okay? So this subpoena, as the Court has said, was issued in September 2017 to Theranos. And there was, as is usual, a kind of rolling production, as I understand it.

And the Government didn't insist, you know, before indictment on getting all these documents if they really cared about them for indictment. They didn't insist on them before their superseding indictment which they returned on September 7th. Instead, what's clear -- even from Mr. Bostic's own email -- and I don't know if the Court's reviewed that. It's maybe buried in the exhibits. But there's an email from Mr. Bostic to Wilmer Hale --

THE COURT: I've read all the exhibits.

MR. COOPERSMITH: Thank you, Your Honor. And in that email, Mr. Bostic says, Well, we're running out of time because, you know, Theranos is -- and that's a paraphrase, but that's what he said -- we're running out of time because Theranos is about to go into this assignee proceeding. It's sort of like a receivership, but it's noted as an assignment for the benefit of the creditor.

So when you think about that, what it looks like they're really doing here is they're concerned that when Theranos is no longer in existence and there's some assignee who they have to deal with, maybe it's going to be harder to get the documents.

And that's exactly like the case we cited from the Eastern

District of Michigan, the *Kovaleski* case. Because here's what happened there.

There was already an indictment in that case and there was a witness the Government wanted to talk to -- his name was Maurice -- and Maurice was a federal defendant in custody and he was about to be released. And the Government issued a grand jury subpoena to this witness, Maurice, because they wanted to talk to him. And the Government said, you know, Look, once he's released from federal custody, it's going to be a lot harder to find him and we may not be able to -- and the court said, No, that's not correct. And the court repeated the test -- the dominant or sole purpose. They said, Under the facts and circumstances of this case, it looks like they're just trying to get a hold of this witness for trial preparation purposes and it's not really about the grand jury.

THE COURT: But I don't -- I did not read that case as the court wasn't using the fact that there was already an indictment as a dispositive point. In fact, I didn't see that in any of the cases which really seems to be the, you know, key point in the defense argument here, which is that this production is post-indictment, it's post the preceding indictment, but I just don't see the cases as using that as a determinative --

MR. COOPERSMITH: Well, as I said before, Your Honor, these cases are all individual facts and circumstances.

THE COURT: Yes. They are.

MR. COOPERSMITH: And the fact -- we wouldn't even really be discussing this if we were pre-indictment, right? -- because pre-indictment, you know, the Government's allowed, I think, to fish around all they want -- within some limits -- but they can fish around until they satisfy themselves that they have what they have to have.

After indictment, this is where this rule kicks in. So I think it's just part of the case law here that we're talking about these cases in a post-indictment setting where the Government's trying to continue to use the grand jury process. And I think that is an important point.

Here, of course, I do think it's important that we have not only an indictment but we have a second -- we have a superseding indictment.

And I understand that the Government theoretically could have some mission, you know, to supersede. But as I said in the first instance, Your Honor, what we've got here is the Government isn't articulating anything other than, Well, we could continue to investigate. Maybe -- some cases allow money laundering investigations. Some cases allow obstruction investigations. You know, who knows what we're -- I think it's really just they're thinking they're allowed to continue to abuse the grand jury until they rule out the possibility of superseding indictment.

And as I said before, that cannot be the law, Your Honor -- and it's not.

But --

THE COURT: But here's -- in this case, again -- and I agree facts and circumstances -- here, we have an indictment -- a subpoena issued and we have a long period of meet and confer and rolling productions -- a lot of which are tied to other civil litigation, which is not that unusual. We've got productions ready to go, documents that have been reviewed that are responsive. And we have this what appears to be a long process over time of negotiating and production and rolling production and rolling production and this is, arguably, yet another installment in a long line of a rolling production that was negotiated with a subpoena well in advance of the indictments and it's part of that ongoing process.

MR. COOPERSMITH: Your Honor, I don't think that matters at all. The fact that there was a preexisting subpoena or they issue a new subpoena after indictment, the same principle is at work -- that they are continuing to use the grand jury process.

They have no authority to force document productions under a grand jury subpoena, witnesses to appear under a grand jury subpoena, unless there's a purpose to indict and not to -- or, in this case, second supersede the indictment -- and not just to fish around till they rule around the possibility that they might find something.

And, Your Honor, the facts and circumstances -- I mean --

THE COURT: But haven't you flipped the standard on its

head then? Isn't the test that the sole and dominant purpose has to be an improper purpose?

MR. COOPERSMITH: I think ultimately that is the test, Your Honor, but I think the facts and circumstances really bear that out. And here's what we've got.

You're right that we have a September 2017 subpoena. And you're right that there were some rolling productions that the Government was allowing on the sort of lenient schedule, you know, until Theranos was going under.

I think we have the fact that they're really it looks like just trying to storehouse documents 'cause it's like, you know, saving up the acorns for winter or something. You know, they might find something.

THE COURT: So on that point -- and I know you argued this extensively in the briefing and you brought it up this morning about near the end, that when it's clear that Theranos as an entity is about to disappear or go into -- I think of it as receivership, but you're right. It's an assignee to creditors -- there's an email from the Government saying, Well, we're running out of time. We're getting close.

MR. COOPERSMITH: Right.

THE COURT: But that could have easily occurred pre-indictment; I mean, that same discussion -- that the company is winding up and time is running short and it is -- I mean, the fact, whether the grand jury is pursuing documents for a proper or

improper purpose, the -- the reality, the fact is that when the company's gone, it's harder to get those documents.

MR. COOPERSMITH: And that's exactly --

THE COURT: So -- so how does that -- the "we need this before the company goes away" inform the question of whether or not it's a proper or improper purpose?

MR. COOPERSMITH: Because, Your Honor, first of all, they could have had that discussion any time, you know, before indictment, as the Court has pointed out. And if they cared about the documents, if they really needed this for an indictment, they could have had that discussion. They could have insisted that Theranos, who had, you know, very experienced, well-staffed counsel in Wilmer Hale, they could have said, You know what? We need these documents in March 2018 or any time they wanted.

THE COURT: But prior to indictment, the company wasn't -- the company wasn't going away.

MR. COOPERSMITH: But that -- that makes the point that I was trying to make, Your Honor, which is that the reason why they all of a sudden cared about these documents is -- and this is one factor. I'm going to go into some others -- but the reason why they all of a sudden cared about these documents so much is because they were worried that they might have a harder time getting them, not because they really needed it for some investigatory purpose. It was really just, We're gonna storehouse some stuff so that maybe something will be in there that we'll

eventually look at that leads us to supersede or maybe it will just be good for trial.

And I think that's one factor, but it's not the only one, Your Honor. Remember that the Government's investigated this case -- I think it's in Mr. Bostic's declaration -- they started in early 2016. So we're talking about a two-and-a-half-year investigation before the indictment.

So when you look at the subpoena, which is attached, it's very broad. It's exactly the same topics that they indicted on and superseded on. And so, by definition, at the time they issued that subpoena in September 2017, they could not have had a purpose for later superseding. We were in communication with the Government for a long time before this indictment. You know, we weren't in a hurry to get indicted. Mr. Balwani wasn't going anywhere. Ms. Holmes wasn't going anywhere. They could have waited to indict, but they didn't. They had enough to indict, and now they're worried about storehousing documents.

But the fact that the subpoena's so broad, it's on the same topics, is very strong evidence that this was not really a subpoena issued for the purpose of superseding. I think it would be different if you had a subpoena issued -- the new one today that was on some topic that, you know, had not been previously indicted. So I think the nature of the subpoena's important.

And also, as the Court pointed out, this time period is crucially important. So we've got a time period from October 2016

through September 2017. That's what they want. Well, by that time period, Mr. Balwani had left the company months before. Ms. Holmes was still with the company. But as we've shown, this indictment is about lab operations and alleged investor fraud. There were no investors during that time period. No investors came in to Theranos. I think the Government will agree with that. There was no lab operations during that time period.

You know, the Government doesn't say that they're investigating obstruction or money laundering. They just say, well, you know, theoretically the Government in some cases could do that. And the reason they don't say it is because that's preposterous. You know, Mr. Balwani never made a dime from this case. Ms. Holmes never made a dime from this case. They held onto their stock, never sold even one share. There's no money laundering here and there's not a whiff of obstruction.

So that's not even something the Government's really arguing.

So this time period is very suspect, Your Honor, and it's one of the factors that leads, I think, a reasonable finder here to say, Well, this is really just storehousing documents when preparing for trial. The dominant purpose doesn't seem to really be to investigate.

Your Honor, the timing and breadth of the subpoena here, the fact that it's gone into exactly the same topics as the indictment, the fact that they never wanted that, the storehousing of documents, the time period involved -- all of these factors I

think are strong evidence that the dominant purpose -- and it doesn't even matter if the Government, you know, as the *Kovaleski* case points out -- if they have -- let's just give them the benefit of the doubt from that. Let's say they have a purpose that they might want to still investigate. That doesn't matter if the facts and circumstances lead the Court to believe that the dominant purpose is to prepare for trial or just to storehouse documents because it's easier to use a grand jury subpoena.

As one of the cases pointed out, the grand jury process is the most powerful discovery tool ever invented, and, you know, I understand the tendency to want to use that power if you have it. But at this point, Your Honor, we're already post-superseding indictment. I don't think that they have the ability to use a grand jury. The facts and circumstances just aren't there.

And if the Court hasn't any more questions, I think Ms. Roper has additional points about the common interest issue.

THE COURT: Okay. Thank you, Mr. Coopersmith. That's helpful. What I'd like to do, actually, is hear from the Government just on the proper/improper purpose question and then we'll turn to the privilege issue.

MR. COOPERSMITH: Yes, Your Honor.

THE COURT: Thank you.

MR. BOSTIC: Thank you, Your Honor.

THE COURT: Mr. Bostic.

MR. BOSTIC: I also have some arguments about standing,

but I am happy to wait until later to address Mr. Coopersmith's points on that.

THE COURT: I think standing, at least as it relates to the status issue, as opposed to the privilege issue, if you -- if you want to break it out that way and address it now since that's how it was presented by the Defense.

MR. BOSTIC: Okay. I think we should start by recognizing the language in cases cited by the Government and by the Defense acknowledging that this kind of charge is easy to make but hard to prevail on. This case proves that. It's been easy for the Defense to raise this issue with the Court, and require a response from the Government, but ultimately their arguments fail -- not for lack of good lawyering or effort, of course, but just because the standards are stacked to prevent this kind of claim from succeeding where it shouldn't.

When courts say that this kind of claim is difficult to prevail on, they're not complaining about an injustice that needs to be corrected. They're acknowledging the way the system is designed -- to preserve the integrity and the autonomy of the grand jury. So I think that's something that we need to keep in mind.

Courts, instead of trying to make things easier for defendants to bring these claims, they faithfully adhere to the standards requiring them to have a presumption that the grand jury is operating within its authority and that the burden is on the

defense to show otherwise.

Mr. Coopersmith said correctly that the grand jury is a very powerful discovery device. It has powerful discovery capabilities. That's not an accident and it's not a gift that the Government gave to itself. It's built into the system. It's how it's supposed to work.

THE COURT: But it's not unchecked.

MR. BOSTIC: It's certainly not unchecked.

THE COURT: It's not carte blanche and here we are.

MR. BOSTIC: Exactly, and that's why we're here. I think on the question of whether the Government is using the grand jury properly here, again, we should start with the presumption -- it's curious that defense counsel said that he wouldn't call it a presumption of regularity because that's what the Supreme Court calls it in the *R. Enterprises* case cited by the Defense and by the Government. That's precisely what it is. There is a presumption "absent a strong showing to the contrary" that the grand jury is acting within the legitimate scope of its authority.

Justice O'Connor in a different case again recognized the presumption of regularity and said that to upset it required particularized -- excuse me -- particularized proof of irregularities. The burden of showing that rests squarely on the Defense, and the Government's position is that they haven't satisfied that burden here.

Addressing whether the Government is using the grand jury

subpoena properly, I think it would be helpful just to walk through the timing of events here. I think Mr. Coopersmith addressed some of this.

As he said, the Government's investigation began in early 2016. In September 2017, the Government served -- excuse me -- the grand jury served a subpoena on Theranos. The scope of that subpoena was informed, of course, by the investigation that came before it. By that point, it was already clear that the conduct they investigated had permeated the story of Theranos. That necessitated the somewhat broad scope of the subpoena. The scope of the subpoena matched the scope of the grand jury's investigation.

Shortly after serving that subpoena, the Government began a series of conversations with Theranos counsel -- as the Court said, negotiating a rolling production of those responsive documents.

The Government in those negotiations prioritized receipt of documents that it would need sooner in the investigation and de-prioritized documents that it would not need until later in the investigation. That is not to say that there were some documents that the Government requested that it didn't really need for the grand jury's investigations. If it was called for in the subpoena, the reason is because it was needed in order to complete that grand jury investigation.

Now, at some point -- obviously in June 2018 -- part of that

investigation became ripe for indictment and the Government did seek an indictment and the grand jury indicted. But as the Government points out in its briefing, that indictment doesn't capture the entire story of Theranos. It doesn't capture all of the potential criminal conduct here. It has two defendants only, whereas the story involves dozens of additional people. I'm not saying that they're targets of the investigation, but that's a fact.

The indictment covers two theories of fraud only and just specific counts within those two theories. This story is bigger than what is captured in the indictment, and the investigation of that conduct beyond the indictment continued after June 2018. That indictment was just an event in the ongoing investigation.

THE COURT: I understood Mr. Coopersmith to argue that in looking at the scope of the subpoena, that if you line up the scope of what -- what was asked for under the subpoena with the scope of the allegations in the indictments, that that -- that those line up and that, therefore, now to be seeking additional documents would be to bolster that, not to -- that is, to prepare for trial, not investigating other -- other crimes or beyond the indictment, which is the requirement; right?

MR. BOSTIC: Correct. I think two points in response to that. First, the fact that the subpoena targets the same subject areas and topics as that -- as the ones that are addressed in the indictment doesn't mean that, again, the indictment captures

everything that was out there. The investigation is broader than the discreet counts in the indictment, and there is nothing in the case law suggesting that the Government can't continue to investigate similar offenses after a certain indictment is handed down against certain defendants.

There could be additional similar counts against those same defendants. There could be additional similar counts against further individuals, and there's nothing that prevents the grand jury from continuing to investigate that, as long as it is outside the scope of the initial indictment.

The other point is that I think on this issue, the Defense actually argues against itself when it points out the division or the separation between the time period of documents received in this latest production and the time period captured by the conduct in the indictment.

The Defense is correct that -- and the Government points this out -- that the indictment's counts end in time before the time period covered by this batch of documents that we're talking about today. That's actually in support of the Government's argument because it shows that there is a separation between what was already indicted and what the Government continues to investigate by obtaining these documents. It seems that the Defense is making the argument for the Government that these new documents aren't strongly related enough to the indicted conduct, but that's the very reason why the Government is permitted to obtain these

documents by a grand jury subpoena -- because they do go beyond what is captured in that initial indictment.

After the indictment, of course, the investigation continued, as I mentioned. The Government recently sought and obtained a superseding indictment. That had the same scope as the original indictment. I think in the Defense briefing, the Defense implies that that superseding indictment had something to do with the Defense's challenge to the subpoena. Let me just assure the Court that's not the case. The timing of that indictment was locked in I believe before Mr. Coopersmith raised his complaint about the use of the subpoena and the two have nothing to do with each other.

What the superseding indictment shows is that the investigation is indeed ongoing, and it shows that the Defense, as it should be, does not have perfect insight into the details of that investigation.

Around that same time, around the same time of the superseding indictment, the Government was wrapping up its collection of documents from Theranos. The Defense here complains about the timing, arguing on the one hand that the Government waited too long before obtaining the documents, and then on the other hand that the Government rushed in obtaining them before Theranos dissolved.

As to the second point, I think the Court correctly noted that it's natural for the Government to want to obtain necessary

evidence before it might become unavailable. That's consistent with a proper or an improper purpose. The Government's view was that those documents were necessary to complete the grand jury's investigation. Of course we're going to do what we can to obtain them before they head somewhere else.

That was the reason why the Government pushed to obtain those documents before Theranos folded. If Theranos had not been going under at that time, we might have waited another month or so before kind of issuing that ultimatum. But the Defense is incorrect if it's implying that, otherwise, the Government would have waited until closer to the trial. That's simply not the case.

As far as why the Government didn't obtain those documents sooner or try to, the answer is simply that the investigation didn't require it until it did. There was enough to keep the investigation going during the months preceding that.

On the standing question -- and I'll hold off on addressing privilege-based standing. But I think the main point to recognize there is that it's simply not as cut and dried as the Defense makes it seem. I think in its opening brief, it does try to rest standing on the privilege question. In the reply, it pivots and the Defense says that they have standing by virtue of their status as defendants.

Of course, if that were the case, any defendant would have standing to challenge any grand jury subpoena, and I don't think

the case law is consistent with that. That would be a very simple rule to articulate, but the Defense doesn't cite a single Ninth Circuit case holding that.

Instead, what we see in the case law is a mixed bag. For example, in the *Okun* case cited by the Government, that involved an investigation into a company where the sole shareholder and CEO was found not to have standing to quash a subpoena on in-house counsel. Now, because that individual was the sole shareholder and CEO of that company, he was the putative defendant in that case, but he still did not have standing to challenge that subpoena.

In the *Punn* case, P-u-n-n, the district court said that "An indictment defendant lacks standing to quash subpoenas on his adult children," and the Appeals Court dismissed that due to a lack of appealability.

So, again, if every defendant had standing just by virtue of being a defendant, that district court decision would have come out differently.

THE COURT: That first case, though, I know I looked at that carefully, but you really get caught up in the role of in-house counsel. I mean, here we have the Defendants who are principals at the company which is the receiver in the subpoena and it's their activities in those roles that then are the basis for the -- for the indictment.

So I have a -- it seems that the Defendants stand to suffer

a direct and personal harm if this subpoena is improper because they're so closely involved with the company. They're not just defendants and this is a third party subpoena. I mean, this is -- it's much -- there's a much closer relationship than I saw in the cases from either side.

MR. BOSTIC: I guess I'm not sure then what the particularized harm would be still, though, unless we're talking about a potential violation of privilege -- and we'll both have things to say about that.

I think the only --

THE COURT: Well, as Defendants, if there's an improper continuing reason, preparation for trial, using documents improperly, the harm seems pretty obvious.

MR. BOSTIC: And that were enough to confer standing, again, I'm just saying I think several of these cases would have turned out differently. I hear your points about the *Okun* case, of course, but I think the *Punn* case would have turned out differently if defendants automatically had standing to issue these kinds of challenges.

THE COURT: I agree with both sides, that it's a facts and circumstances test or a mixed bag, if you like.

MR. BOSTIC: With that, let me just address a couple more cases cited in their reply just because the Government hasn't had a chance to address those in briefing.

The *Fernandez* case which the Defense cited and mentioned, the

Defendants say in their brief that that court found that defendants had standing but, actually, there were two defendants in that case and that court only found standing as to one of the defendants based on the strength of the showing made by that defendant. As to the second defendant, the court expressed "serious doubts about standing."

So, again, if Defendants automatically have standing, that would have been a much simpler analysis and that language would have been different.

And, finally, on page four of the Defendants' reply, they cite a treatise for the proposition that Defendants have standing in these cases. In fact, if you look at that treatise and look at the entire sentence that that quote comes from, it's not saying that that's the law. It's actually expressing two competing viewpoints. The first part of that sentence says some courts hold that defendants do not automatically have standing, and it cites a case which is 32 FRD 175. The authors of that treatise express a preference for the permissive standing approach but, of course, that is not binding on this Court.

So, again, the overall point is that this is not a cut and dried issue. There are serious questions about whether the Defendants have standing to bring this challenge. But it's even more clear under the law that in light of the presumption and the burden, the numerous cases saying that indictments don't invalidate subpoenas, the differences between the cases cited by

the Defense, where post-indictment subpoenas were invalidated, the differences between that case -- excuse me -- those cases and this case show that the Government is using the grand jury subpoena correctly here.

For example, if you look at the *Leung* case, L-e-u-n-g, the Second Circuit in that case rejected a similar argument about post-indictment subpoenas.

The timing here is simply not enough to upset the presumption of regularity that the Government enjoys.

I should also mention the *Kovaleski* case, which Mr. Coopersmith referred to, that case -- first of all, it's an Eastern District of Michigan District Court case that's not binding in any way here. But more than that, the timing of that case is instructive. In that case, the grand jury subpoena came after a mistrial, so after a tried and failed jury trial where the witness might become available before the retrial. The connection between that grand jury subpoena and the trial is a lot easier to see in that case than it is in this case. The most important thing, though, about that opinion is that it applies the wrong standard. It completely flips the presumption on its head. The court approaches the question of presumption and burden as an issue of first impression and decide to put the burden on the Government to prove that it is using the grand jury subpoena properly.

As shown by other cases cited by the Government, that's just

flat out the wrong approach. That's the opposite of the approach that the Court is required to use.

So I think the Court needs to disregard the *Kovaleski* opinion It's just not instructive here.

And I'm happy to answer any additional questions the Court might have.

THE COURT: Thank you, Mr. Bostic. I'd like to turn now to the privilege question and I'll hear from the Defense and then come back to Government. I take the privilege arguments as presented really in the standing discussion. And if I don't grant the order, then what do we do about it and how do we manage that? So, please.

MS. ROPER: Your Honor, if the Court is likely to -- or if the Court is inclined to deny the Government -- the Defendants' motions, the Defendants would request, at the very least, a taint team or filter team be used.

THE COURT: Uh-huh.

MS. ROPER: Your Honor, the documents at issue contain communications between both counsel for Mr. Balwani and Ms. Holmes, but also counsel for Theranos that are protected by these comments just in joint defense privileges.

Counsel or all three parties were engaged in a shared litigation interest, and --

THE COURT: By "all three parties," you're talking about?

MS. ROPER: Mr. Balwani, Ms. Holmes, and Theranos.

THE COURT: Okay.

MS. ROPER: Not the Government, Your Honor. Were -- were shared in litigations in at least six separate matters. There was a DOJ investigation. There was an SEC investigation. There was a CMS investigation. And there were also three civil litigations -- the Delaware PFM litigation, an Arizona class action litigation, and a California (indiscernible) litigation.

In addition to those six different matters, Ms. Holmes and Theranos shared a litigation interest raised in patent litigation; for example, the Hughes (ph) litigation.

Outside counsel for Ms. Holmes and Mr. Balwani communicated with inside counsel at Theranos; for example, with Ms. Heather King and Brad Harrington. Neither of those lawyers' names were included in the limited privilege filter. They did share a dual role. However, part of their role was general counsel; for example, for Ms. King. And as general counsel, she spoke with outside counsel for the Defendants.

The privilege filter was also limited by the fact that it used full names and email addresses. By doing so, not all communications would be captured by the filter. For example, if Ms. King was emailing about a discussion she had with outside counsel, she could refer to counsel by their first name. She could have said "John" or "Steve" or "Jeff" rather than using last names. She could have referred to them by saying, "I spoke with

Elizabeth's lawyer" or "I spoke with Sunny's attorney." It's my understanding --

THE COURT: Using filters with only first names, though, renders --

MS. ROPER: Which I would believe that eyes-on -- right -- eyes-on review is important in a case like this --

THE COURT: Uh-huh.

MS. ROPER: -- where there were years and years and years of litigation and hundreds -- I don't even know how many times there were communications between outside counsel and -- before Ms. Holmes and Mr. Balwani and inside counsel.

Also, the fact is that it is our understanding that confidential and privileged were not used as privileged terms in this.

So, Your Honor, the only way, in Defendants' opinion, to protect these privileged documents is by having an eyes-on review to ensure that those documents aren't produced.

THE COURT: All right. Did you have anything with regards to privilege and the rule of standing?

MS. ROPER: Your Honor, our -- I think our main focus was the status argument.

THE COURT: Uh-huh.

MS. ROPER: I would note that one of the reasons why it's important for defendants to have this right to be able to object when an abuse of the grand jury process is at issue is,

one, if in this case the Government is allowed to proceed, they're basically getting custodial files on numerous people at the company and they're able to do a fishing expedition to a production. Had they used the proper process and gotten -- weren't able to get the documents this time, they would have to use Rule 17 subpoenas. Rule 17 subpoenas are far more limited. They're limited by the Nixon factors. The documents have to be admissible and they have to be relevant and they have to be -- they have to use specificity in requesting the documents. It's not just a free-for-all, We want these group of documents.

So the Defendants are actually harmed by now going to a trial where all these documents are coming into play, or at least they could be charged with further charges when they were not able to do so previously.

THE COURT: Let you just go back for a moment, Ms. Roper. The litigation matters that you referred to --

MS. ROPER: Yes.

THE COURT: -- in support of the argument that there are shared privileges between Theranos and the Defendants. Were all of those ongoing through the same time frame of the subpoena?

MS. ROPER: Your Honor, I believe the DOJ investigation was, the SEC investigation was, CMS -- yes, all of them, except the patent litigation, I'm not sure when that ended. I believe it was during the time of the full subpoena.

THE COURT: But the other -- the six matters that you

have referred to, it's your understanding that those are coexistent -- at least for this one, the time frame that's --

MS. ROPER: And, Your Honor, if I may?

THE COURT: Uh-huh.

MS. ROPER: Yes, Your Honor. I think with the exception of the patent litigation, that's correct.

THE COURT: Okay. Thank you.

MS. ROPER: Thank you.

THE COURT: Mr. Bostic, with regards to privilege.

MR. BOSTIC: Thank you, Your Honor. With regards to privilege, the Government cites in its brief cases establishing that the burden is, again, clearly on the proponent of the privilege to establish its existence and applicability.

We heard some additional detail just now, but the written submissions from the Defense don't come close to meeting that standard. I think Mr. Coopersmith's declaration in the reply contains one sentence addressing this fact, saying that between October 2016 through September 2017, he was engaged in email exchanges with Theranos' former counsel from Wilmer Hale that were protected by the common interest privilege. That's simply not enough to establish that the privilege is actually at risk here.

Whether a communication is protected by that privilege is a complex legal factual question. There are no supporting facts here establishing that those claims of privileged communications would actually be included in the production that the Government

just received.

I understand that the Defense is not satisfied with the filter that Theranos itself generated. But if we're talking about communications between the lawyers in the courtroom and in-house lawyers at Theranos, it's no problem that the in-house lawyers' names were not used as part of that filter because these lawyers' names were used as part of that filter.

So --

THE COURT: I think they're talking about between the Defendants and in-house counsel -- that's my understanding of it, that there may well be privileged discussions relating to some of the matters that come under a common interest privilege.

MR. BOSTIC: So I think -- I don't know that they've given us any reason to think that there are communications between the individual Defendants and their in-house counsel that relate to their own personal privileges or the joint defense privilege.

I hear about communications between the lawyers themselves, but there's been no even factual assertion that there was privileged communications, other than corporate privileged communications, internal at the company.

THE COURT: Let's assume that the similar facts that -- the facts and circumstances in this case, given the role of the Defendants at the company, the number of years we're looking at, the many activities that are addressed in the grand jury subpoena and some of which are reflected in the indictments, all of those

facts that would support a proper use of the subpoena in this case arguably could also support legitimate and serious concerns about privilege.

So let's assume for a moment that this September 14th production that was turned over by Theranos more probable than not has privileged documents in it. What does a taint team look like? How does the Government address that? If I order a taint team, what does that look like?

MR. BOSTIC: So it varies from case to case, Your Honor.

THE COURT: Of course.

MR. BOSTIC: And the basic answer is that AUSAs who are not part of the trial team are assigned to review some or all of the documents and to make a determination as to whether they are privileged before they come to the trial team.

Now, because I -- I mean, I did say that it varies from case to case, and that brings us to one of the problems with the Defendants' request that the Court order the Government to use a taint team. That approach really needs to be tailored to the specific facts of the case.

There's also no showing in the Defendants' submissions as to what the Court's authority is to order the Government to use a taint team and what the standard is for issuing that order. It appears kind of as an afterthought in their reply. And I don't think it's really properly before the Court.

But in any case, the Government is already incentivized to

avoid that taint. The Government has no desire to improperly view privileged materials in this case. We're already incentivized to protect against that possibility. So our position is that the Court order simply isn't necessary.

As to Theranos's corporate privilege, I should point out that because the company was relying on filters in producing documents to us, it entered into an agreement with the Government whereby the trial team would not be tainted by the inadvertent viewing of any privileged material that happened to slip through those filters.

THE COURT: That's an agreement between Theranos and the Government.

MR. BOSTIC: Between Theranos and the Government. Correct, Your Honor. So that covers any corporate privilege of the company itself.

THE COURT: But it doesn't extend to the individual Defendants.

MR. BOSTIC: That's correct, Your Honor, and the -- what the Government argues is the speculative risk that there may be some documents implicating personal privileges of the Defendants in that set.

But the Government is motivated to avoid viewing those documents improperly

THE COURT: All right.

MR. BOSTIC: As to the issue of standing, I think -- I

think the Government's position needs to be that the Defendants simply haven't met their burden to establish a sufficient and particularized risk of the privilege being invaded to support their standing arguments. The burden has been on them and we just don't have the factual showing necessary, despite the fact that I understand they have access to the documents that -- or at least had access to the documents that Theranos produced to the Government over the course of the investigation.

THE COURT: All right. Thank you, Mr. Bostic.

MR. BOSTIC: If I could just make one more point, too, on Mr. Coopersmith's argument that --

THE COURT: This is your last chance at the microphone, so --

MR. BOSTIC: Understood.

THE COURT: -- you can make this additional point and then Mr. Coopersmith does get the final word.

MR. BOSTIC: I'll give it up gladly after this. Mr. Coopersmith suggested that the validity of the Government's ongoing investigation might depend on whether there's going to be a second superseding indictment. I just want to push back against that because that's a dangerous standard to push for.

The Government cites cases that make it clear that the legitimacy of an investigation does not turn on whether it results in charges at the end. I don't think the Defendants really want to incentivize the Government to search for charges in order to

legitimize its investigation -- not that we would, of course -- but that's the very reason why that's the rule -- so that the Government can participate and the grand jury can continue its investigations without being pressured. The entire point is to finish the investigation and then let the evidence dictate whether there are additional charges after that.

THE COURT: Understood. Thank you, Mr. Bostic.

MR. BOSTIC: Thank you, Your Honor.

THE COURT: Mr. Coopersmith, closing remarks.

MR. COOPERSMITH: Thank you, Your Honor. So what I heard Mr. Bostic say in one part of his remarks is he conceded that the subpoena that was issued nine months before the June 2018 indictment in this case tracks the indictment -- that the topics that they were investigating based on that subpoena are the topics that are in the indictment. And I think that's a very significant point because, as I said before, now that Mr. Bostic's conceded that, it by definition was not a subpoena designed for any continuing investigation post-indictment. They had two and a half years, Your Honor, including the subpoena, to gather everything they needed to gather and they indicted.

And now the other thing I wanted to say, Your Honor, is it's -- if it was enough for an Assistant U.S. Attorney to stand up in the court and say, "We're still investigating, Your Honor. We may have other people involved" -- although they're not targets, apparently -- then every case would be automatically they can use

the grand jury for whatever they want. And there's been no showing by the Government whatsoever that they have any additional targets, that they have any additional topics that they haven't already covered.

And what the facts and circumstances I think strongly show here, Your Honor, is that they are simply trying to -- and I think this is basically the Government saying -- that they should be allowed to gather whatever documents they want through the grand jury process and review them to their hearts' content to rule out the possibility there might be something else there.

And again, Your Honor, if that is allowed, that is going to be every single case, and there is no limiting principle that anyone could think of.

And I agree with Mr. Bostic -- it is hard to police this. But as the *Fernandez* court said, it's nonetheless, you know, the job of the court to do that, with the supervisory authority.

And, you know, what we have here is I think as clear a case as we have in any of these other matters, other cases, that the grand jury's being used for trial prep or at least just for the purpose of storehousing documents.

THE COURT: I didn't -- I did not hear the Government make that argument. The argument I heard, among others, was that the time frame addressed in the indictments does not cover -- the activity in the indictments does not arise out of the time frame that's the subject of this subsequent production

MR. COOPERSMITH: Yes, Your Honor. That's an important point. So this is what I think the Government's saying there -- that that period of time, from September -- October '16 through September '17, they don't know what's in those documents. It's --

THE COURT: Well, of course not. They haven't seen them.

MR. COOPERSMITH: Right. So what they're doing is -- and, remember, those documents were called for by a September 2017 subpoena.

THE COURT: But why hasn't that been covered by the investigative power of the grand jury?

MR. COOPERSMITH: Because -- I understand, Your Honor, but I think what they're saying is, There might be something there. You know what? Let's pick another time period. There might be something in any time period. What about after 2017? Why don't they issue a new subpoena now and say, Well, maybe something happened between then and 2018. I mean, you can pick any time period you want, and what they're really saying is, We should be allowed to get whatever documents we want and, even if it's a time period where the Defendants were no longer running a lab or taking investors, and there might be something there. We can't rule it out. So we should be allowed to peruse those documents until we rule out the possibility that we might find something.

And that's not what an investigation is, especially when you

have -- and it's very important. When you have an indictment, you have a superseding indictment, we have rules, including Rule 17. We have trial prep mode now and they are still using the grand jury because they want to, you know, see if they can rule out a superseding indictment.

Again, Your Honor, I can't make --

THE COURT: Why do you need trial prep when you don't have the -- you've got a pre-indictment subpoena, you've got a long-term rolling production. You don't even have a schedule in the case yet. And there could be additional indictments; right?

MR. COOPERSMITH: There always could be, Your Honor. There's no case that we could ever think of that comes before the court that that isn't a possibility.

THE COURT: But the burden's on you -- the burden is on the defense --

MR. COOPERSMITH: Yes -- well --

THE COURT: -- to demonstrate a dominant improper purpose.

MR. COOPERSMITH: I think the burden is on us.

THE COURT: Uh-huh.

MR. COOPERSMITH: But it's also relevant that the Government hasn't come forward with a single thing that they're actually really investigating with the grand jury process. But I'm happy to --

THE COURT: Doesn't the Ninth Circuit make it clear that

they don't have to?

MR. COOPERSMITH: Well, I don't think -- I think there are cases where the Government does come forward with a lot more than they've come forward with here.

THE COURT: But I think the Ninth Circuit has said they don't have to.

MR. COOPERSMITH: Not necessarily -- you're right. They don't necessarily have to. The Ninth Circuit has said that. But there's nothing that rules it out. And I think it's, you know -- the silence does speak volumes.

You know, from our standpoint, Your Honor, we do think we have a dominant purpose because you're right -- the trial -- the subpoena was issued a long time ago. But there's no difference between trying to enforce a preexisting subpoena that already has the same topics covered in the indictment and issuing a new subpoena now. It's the same thing.

And, again, I can't make this point, you know -- I know I've said it before, but I'll just end with this. I think the Government is articulating that there is no limiting principle. As long as they stand up here and say, We're still investigating them, I believe Mr. Bostic is saying that in good faith because he can't rule out that there could be something in those documents.

But that can't be the standard because I think we're going to be doing that in every case. Thank you.

THE COURT: All right. Thank you, Mr. Coopersmith. All

right. Matter's submitted?

MR. BOSTIC: Yes. Thank you, Your Honor.

THE COURT: Submitted?

MR. COOPERSMITH: Yes.

THE COURT: Yes. Thank you. All right. I appreciate that time is somewhat of the essence. I know that Judge Davila wanted us particularly to have this hearing in advance of the status conference. So you will get an order from me on this this afternoon.

I want to thank counsel for your preparation for today. I found argument very helpful. As I said, I had spent time, obviously, with the papers and the exhibits and the cases cited therein. So you will hear from me this afternoon.

MR. BOSTIC: Thank you.

THE COURT: All right. Thank you. We're adjourned.

THE CLERK: Court's adjourned.

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(Proceedings adjourned at 11:12 a.m.)

I, Peggy Schuerger, certify that the foregoing is a correct transcript from the official electronic sound recording provided to me of the proceedings in the above-entitled matter.

/S/ Peggy Schuerger
Signature of Approved Transcriber

October 19, 2018
Date

Peggy Schuerger
Typed or Printed Name

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